Reply Form

**to the Consultation Paper on Technical Advice on the Scope of CSDR Settlement Discipline**

Responding to this Consultation Paper

ESMA invites comments on all matters in this Consultation Paper and in particular on the specific questions summarised in Annex 1. Comments are most helpful if they:

* respond to the question stated;
* indicate the specific question to which the comment relates;
* contain a clear rationale; and
* describe any alternatives ESMA should consider.

ESMA will consider all comments received by **9 September 2024.**

All contributions should be submitted online at [www.esma.europa.eu](http://www.esma.europa.eu) under the heading ‘Your input - Consultations’.

Instructions

In order to facilitate analysis of responses to the Consultation Paper, respondents are requested to follow the below steps when preparing and submitting their response:

• Insert your responses to the questions in the Consultation Paper in this reply form.

• Please do not remove tags of the type < ESMA\_QUESTION\_SETD\_0>. Your response to each question has to be framed by the two tags corresponding to the question.

• If you do not wish to respond to a given question, please do not delete it but simply leave the text “TYPE YOUR TEXT HERE” between the tags.

• When you have drafted your responses, save the reply form according to the following convention: ESMA\_CP1\_ SETD\_nameofrespondent.

 For example, for a respondent named ABCD, the reply form would be saved with the following name: ESMA\_CP1\_ SETD\_ABCD.

• Upload the Word reply form containing your responses to ESMA’s website (**pdf documents will not be considered except for annexes**). All contributions should be submitted online at *www.esma.europa.eu* under the heading *‘Your input - Consultations’.*

**Publication of responses**

All contributions received will be published following the close of the consultation, unless you request otherwise. Please clearly and prominently indicate in your submission any part you do not wish to be publicly disclosed. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure. A confidential response may be requested from us in accordance with ESMA’s rules on access to documents. We may consult you if we receive such a request. Any decision we make not to disclose the response is reviewable by ESMA’s Board of Appeal and the European Ombudsman.

**Data protection**

Information on data protection can be found at [www.esma.europa.eu](http://www.esma.europa.eu) under the heading ‘[Data protection](https://www.esma.europa.eu/about-esma/data-protection)’.

**Who should read this paper?**

All interested stakeholders are invited to respond to this consultation paper. In particular, ESMA invites market infrastructures (CSDs, CCPs, trading venues), their members and participants, other investment firms, credit institutions, issuers, fund managers, retail and wholesale investors, and their representatives to provide their views to the questions asked in this paper.

# General information about respondent

|  |  |
| --- | --- |
| Name of the company / organisation | AFG |
| Activity | Other |
| Are you representing an association? |[x]
| Country / Region | France |

# Questions

1. Do you agree with ESMA’s proposal regarding the underlying causes of settlement fails that are considered as not attributable to the participants in the transactions? Please specify which cases you agree with and which cases you don’t agree with (if applicable). Please justify your answer and provide examples and data where available.

<ESMA\_QUESTION\_SETD\_1>

As identified by ESMA through its CP, there is already an existing [Q&A](https://www.esma.europa.eu/sites/default/files/library/esma70-708036281-2_csdr_qas.pdf) that deals with certain aspects of the scope of settlement discipline that has been applied prior to Refit. Regarding the scope of cash penalties, the Q&A provides for four exemptions[[1]](#footnote-2) that ESMA proposes to incorporate in the level 2 and to extend these exemptions to the buy-in regime. ESMA also believes that two additional scenarios should be considered (i. settlement instructions involving securities under sanctions or anti-money laundering proceedings ii. settlement instructions put on hold due to the order issued by a court, the police or similar authority with relevant mandate).

Regarding the immunisation principle, too many exemptions could have adverse impacts for some parties that get caught in a fails chain. However, as these 4 first exemptions are already implemented today and as it seems they were subject to no particular queries nor that they have been pointed out as breaching the immunisation principle, we believe their incorporation in the level 2 is appropriate.

<ESMA\_QUESTION\_SETD\_1>

1. ESMA would like to ask for the stakeholders’ views on the costs and benefits of the implementation of the respective exemptions from settlement discipline (based on the underlying causes of settlement fails that are considered as not attributable to the participants in the transactions). Please use the table below. Where relevant, additional tables, graphs and information may be included in order to support some of the arguments or calculations presented in the table below.

|  |  |
| --- | --- |
| **ESMA’s proposal - underlying causes of settlement fails that are considered as not attributable to the participants in the transactions** |    |
|   | **Qualitative description** | **Quantitative description/ Data** |
| **Benefits** |   |   |
| **Compliance costs:****- One-off****- On-going** |   |   |
| **Costs to other stakeholders** |   |   |
| **Indirect costs** |   |  |

<ESMA\_QUESTION\_SETD\_2>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_SETD\_2>

1. Do you have other suggestions regarding the underlying causes of settlement fails that are considered as not attributable to the participants in the transactions? Please justify your answer and provide examples and data where available.

<ESMA\_QUESTION\_SETD\_3>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_SETD\_3>

1. If you have answered yes to the previous question, please specify what costs and benefits you envisage related to the implementation of your proposal. Please use the table below. Where relevant, additional tables, graphs and information may be included in order to support some of the arguments or calculations presented in the table below.

|  |  |
| --- | --- |
| **Respondent’s proposal** (if applicable) |    |
|   | **Qualitative description** | **Quantitative description/ Data** |
| **Benefits** |   |   |
| **Compliance costs:****- One-off****- On-going** |   |   |
| **Costs to other stakeholders** |   |   |
| **Indirect costs** |   |  |

<ESMA\_QUESTION\_SETD\_4>

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<ESMA\_QUESTION\_SETD\_4>

1. Do any of the exemption proposed above breaks the immunization principle? Please provide arguments.

<ESMA\_QUESTION\_SETD\_5>

As explained in Q1, it seems that the four exemptions listed by ESMA and that were already implemented today, were subject to no particular queries and were not pointed out as breaching the immunisation principle.

<ESMA\_QUESTION\_SETD\_5>

1. Which of the exemptions proposed above do you think can be filtered out before penalties are applied in an automated way? And which ones can only be exempted ex-post, as part of the already existing appeal mechanism at CSDs?

**Please provide details regarding the cost for ex-ante filtering compared to ex-post exemption via the appeal mechanism.**

<ESMA\_QUESTION\_SETD\_6>

Regarding the way and the timing where these exemptions should be applied, we believe that an ex-ante filtering out before penalties are applied in an automated way is preferable to avoid any manual intervention and additional processes that could be costly and burdensome for actors (we see that manual claims can actually incur greater operational costs then the value of the penalty itself). Although we don’t have a concrete view on each listed exemption, we believe that CSDs should be able to apply them automatically and on an ex-ante basis.

<ESMA\_QUESTION\_SETD\_6>

1. For exemptions that can be filtered out in advance, do you think that a CSD would prefer to implement this filter or not? Also considering the very large number of appeals they might have to deal with and also the costs it will entail.

<ESMA\_QUESTION\_SETD\_7>

As answered to the question above, we don’t have a concrete view on the possibility for CSDs to filter each listed exemption in advance. However, we believe that the process would be much easier as we see that manual claims can incur greater operational costs then the value of the penalty itself. We therefore believe that CSD would prefer to implement an automatic filter before penalties are applied.

<ESMA\_QUESTION\_SETD\_7>

1. Do you agree with ESMA’s proposal regarding the circumstances in which operations are not considered as trading? Please specify which cases you agree with and which cases you don’t agree with (if applicable). Please justify your answer and provide examples and data where available.

<ESMA\_QUESTION\_SETD\_8>

To avoid breaches of the immunisation principle as well as inconsistencies, we believe that all exemptions that are introduced should be clearly defined.

For instance, we believe that it is not crystal clear what is included in the first exemption (19.a) regarding “*Free of Payment (FOP) collateral transactions*” and notably which transactions are concerned and who is the collateral tri-party agent (I-CSD, banks/custodians). Same goes for the last exemption (19.e) proposed by ESMA i.e. “realignment operations”. Both these exemptions are too vague, making it impossible to clearly state that there won’t be a risk regarding the immunisation principle. We believe ESMA should give further details on these two cases before introducing them as exemptions to the CSDR cash penalty regime. We’ve identified two additional cases that should be exempted : i) situations in which there is a change of custodian and 2) situations in which there is a transfer of a position from one market to another in order to settle a trade, where no brokers are involved and where it’s rather an account-to-account transfer for the same portfolio.

Furthermore, we highly welcome ESMA’s proposal to exempt the creation and redemption of fund units on the primary market (creation and redemption of funds units) except for ETFs. We share ESMA’s proposal not to include ETF primary market transactions as an exemption to the regime as it could have a direct impact on the immunisation principle for authorised participants on ETF redemptions, meaning where a selling counterparty fails into the AP who then fails into the issuer. However, although we agree that there should be no exemption to the create/redeem between AP and issuer, we believe that the ETF create/redeem on the primary market between the issuer and CSDs should be excluded. We understand that that’s what reflected in the third exemption (19.c) “the process of technical creation of securities”.

<ESMA\_QUESTION\_SETD\_8>

1. ESMA would like to ask for the stakeholders’ views on the costs and benefits of the implementation of the respective exemptions from settlement discipline (based on the circumstances in which operations are not considered as trading). Please use the table below. Where relevant, additional tables, graphs and information may be included in order to support some of the arguments or calculations presented in the table below.

|  |  |
| --- | --- |
| **ESMA’s proposal - circumstances in which operations are not considered as trading** |    |
|   | **Qualitative description** | **Quantitative description/ Data** |
| **Benefits** |   |   |
| **Compliance costs:****- One-off****- On-going** |   |   |
| **Costs to other stakeholders** |   |   |
| **Indirect costs** |   |  |

<ESMA\_QUESTION\_SETD\_9>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_SETD\_9>

1. Do you have other suggestions regarding circumstances in which operations are not considered as trading? Please justify your answer and provide examples and data where available.

<ESMA\_QUESTION\_SETD\_10>

We’ve identified two additional cases that should be exempted : i) situations in which there is a change of custodian and 2) situations in which there is a transfer of a position from one market to another in order to settle a trade, where no brokers are involved and where it’s rather an account-to-account transfer for the same portfolio.

<ESMA\_QUESTION\_SETD\_10>

1. If you have answered yes to the previous question, please specify what costs and benefits you envisage related to the implementation of your proposal. Please use the table below. Where relevant, additional tables, graphs and information may be included in order to support some of the arguments or calculations presented in the table below.

|  |  |
| --- | --- |
| **Respondent’s proposal** (if applicable) |    |
|   | **Qualitative description** | **Quantitative description/ Data** |
| **Benefits** |   |   |
| **Compliance costs:****- One-off****- On-going** |   |   |
| **Costs to other stakeholders** |   |   |
| **Indirect costs** |   |  |

<ESMA\_QUESTION\_SETD\_11>

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<ESMA\_QUESTION\_SETD\_11>

1. Do any of the exemption proposed above breaks the immunization principle? Please provide arguments.

<ESMA\_QUESTION\_SETD\_12>

We share ESMA’s proposal not to include ETF primary market transactions as an exemption to the regime as it could have a direct impact on the immunisation principle for authorised participants on ETF redemptions, meaning where a selling counterparty fails into the AP who then fails into the issuer. However, although we agree that there should be no exemption to the create/redeem between AP and issuer, we believe that the ETF create/redeem on the primary market between the issuer and CSDs should be excluded. We understand that that’s what reflected in the third exemption (19.c) “the process of technical creation of securities”.

<ESMA\_QUESTION\_SETD\_12>

1. Which of the exemptions proposed above do you think can be filtered out before penalties are applied in an automated way? And which one can only be exempted ex-post, as part of the already existing appeal mechanism at CSDs?

**Please provide details regarding the cost for ex-ante filtering compared to ex-post exemption via the appeal mechanism.**

<ESMA\_QUESTION\_SETD\_13>

For the same reasons explained in Q6 and Q7, here again we believe these exemptions should be applied with CSD ex-ante filtering out before penalties are applied in an automated way to avoid manual intervention and burdensome processes.

<ESMA\_QUESTION\_SETD\_13>

1. For exemptions that can be filtered out in advance, do you think that a CSD would prefer to implement this filter or not? Also considering the very large number of appeals they might have to deal with and also the costs it will entail.

<ESMA\_QUESTION\_SETD\_14>

See. Q6, Q7 and Q13.

<ESMA\_QUESTION\_SETD\_14>

1. Which transaction types based on the codes allowed by T2S (or potentially other codes such as ISO transaction codes) should be exempted from settlement discipline measures? Please provide the codes, their definition and arguments to justify the exemption.

<ESMA\_QUESTION\_SETD\_15>

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<ESMA\_QUESTION\_SETD\_15>

1. “*i) ISIN suspension from settlement due to a reconciliation issue under Article 65 (2) and (6) of the RTS on CSD Requirements;*

*ii) ISIN suspension from trading, such as for example under Article 32(1), Article 52(1), Article 69(2) of MiFID II or Article 40(1) of MiFIR;*

*iii) settlement instructions involving cash settlement outside the securities settlement system operated by the CSD if, on the respective day, the relevant payment system is closed for settlement;*

*iv) technical impossibilities at the CSD level that prevent settlement, such as: a failure of the infrastructure components, a cyber-attack, network problems, or T2S*.” [↑](#footnote-ref-2)